UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Eighteenth Region

GELITA, USA Employer and QUDSIA S. HUSSAINI Petitioner and INTERNATIONAL FOOD & COMMERCIAL WORKERS UNION, LOCAL 1142 Union	Case 18-RD-2690

HEARING OFFICER'S REPORT AND
RECOMMENDATION ON OBJECTIONS

Pursuant to a petition filed on October 5, 2009,[1] and a Stipulated Election Agreement executed by the parties and approved on October 15, an election by secret ballot was conducted on October 29 among certain employees of the Employer.[2] The results of the election are set forth in the Tally of Ballots which was served on the

[1] Unless otherwise indicated, all dates are in 2009.

[2] The appropriate collective bargaining unit agreed to by the parties and approved by the Regional Director is defined as:

> All full-time and regular part-time Quality Assurance/Quality Control laboratory employees, including the QA/QC Assistant assigned to the Quality Assurance/Quality Control Laboratory Department at the Employer's 2445 Port Neal Industrial Road, Sergeant Bluff, Iowa facility; excluding management employees and guards and supervisors as defined in the Act.

parties at the conclusion of the election.[3] On November 4, the Union filed timely objections to conduct affecting the results of the election, a copy of which was duly served upon the Employer and the Petitioner.

Thereafter, on November 19, the Regional Director for the Eighteenth Region issued a Report on Objections to Conduct Affecting the Results of the Election, Order Directing Hearing and Notice of Hearing, and ordered that a hearing be conducted for the purpose of receiving evidence to resolve the issues raised by the Objections. In his November 19 Report, the Regional Director directed the Hearing Officer to prepare and cause to be served upon the parties a report containing resolutions of the credibility of witnesses, findings of fact and recommendations to the Board as to the disposition of the issues.

Accordingly, on December 1, a hearing was held pursuant to said Report in Sioux City, Iowa before the undersigned Hearing Officer duly designated for the purposes of conducting such hearing. All parties were represented at the hearing and had full opportunity to call, examine and cross-examine witnesses, to introduce evidence pertinent to the issues, and to make statements in support of their respective positions. The Employer, Petitioner and Union submitted briefs following the hearing.

[3] The Tally of Ballots shows:

Approximate number of eligible voters	13
Number of void ballots	0
Number of votes cast for labor organization	6
Number of votes cast against participating labor organization	6
Number of valid votes counted	12
Number of challenged ballots	0
Number of valid votes counted plus challenged ballots	12

I have made the following Findings of Fact based on the entire record in this case and from a careful observation of the manner and demeanor of witnesses while testifying under oath.[4] After carefully considering those facts and the applicable law, I will recommend to the Board that the objections be overruled.

In my Report below, I will first describe the Employer's operation. Next, I will summarize the Board's standard for objectionable conduct. Then, I will discuss witness testimony and apply the law about each objection in determining whether the Employer engaged in any objectionable conduct. Finally, I will set forth my conclusions and recommendation.

FINDINGS OF FACT AND ANALYSIS

The Employer's Operation

The Employer is located in Sergeant Bluff, Iowa where it manufactures gelatin products which are shipped to pharmaceutical and food companies world-wide. The lab employees who are the subject of this petition test the intermediate and final product to ensure it meets specifications. The Union already represents a unit of about 120 production employees at the Employer's facility.

Dean Wood is the head of total quality management. Jeff Abell, the quality control (QC) lab manager, reports to Wood. First-line supervisors Clarke Latten and Marie Rudder report to Abell.

[4] I have carefully considered the demeanor and conduct of the witnesses, as well as their candor, their objectivity and their bias or lack thereof. I have also carefully weighed the witnesses' understanding of the matters to which they have testified, as well as whether parts of their testimony should be accepted when other parts are rejected.

Standard for Objectionable Conduct

The Board's standard for evaluating objectionable conduct is whether such conduct reasonably tends to interfere with the employees' exercise of their free choice in an election. Cambridge Tool & Manufacturing Co., 316 NLRB 716 (1995). The test is an objective one. Ibid. The burden is on the objecting party to establish evidence in support of its objection. Waste Management of Northern Louisiana, Inc., 316 NLLRB 1389 (1998).

Objection No. 1. On or about October 26, the Company offered to Mr. Travis Mooney, a part-time employee, as a material inducement to vote, reimbursement for his mileage expense to come and vote in the election during his off hours.

Facts

The Union called employee Lisa Theisen to testify concerning this objection. On about October 26 Theisen asked fellow unit-employee Travis Mooney if he was going to come in and vote. Mooney told her that he was going to come in and vote and the Employer was going to pay him $.50 cents a mile to do so. Theisen asked if Mooney knew how he was going to vote and he responded that it would be stupid to vote for the Union, as the Union did not want the Employer to utilize part-time employees. Mooney is a part-time employee who works full shifts on Mondays and Tuesdays and a half-day on Fridays. The election was conducted on a Thursday, which is a day of the week that Mooney does not work for the Employer. Theisen in turn told employee Mike Kelly what Mooney told her about him coming in to vote and being reimbursed for his mileage. Theisen worked on the day of the election, no manager offered to pay her mileage to come in and vote, and she did not ask any Employer official to do so.

The Employer called lab technicians Travis Mooney and Norma Fuentes, head of total quality management Dean Wood and QC lab manager Jeff Abell to testify about this objection. Mooney testified that about one and one-half or two weeks before the election he asked supervisor Abell if he could vote at another time, as he was not scheduled to work for the Employer on the day of the election[5]. Abell told him that he could not vote at a different time, and further that he did not know if the time of the election could be changed. Mooney told Abell that he wanted to vote, and also asked if he would be able to get paid or somehow compensated for coming to the facility on a day when he was not scheduled to work. Mooney testified that he asked Abell: ". . . if there was any way I would be able to get paid for coming to work. I didn't know if it would be hours or mileage. I just wondered if I could be compensated somehow."

Abell's testimony was similar to that of Mooney's testimony regarding Mooney approaching him and being concerned about wanting to vote in the election but not being able to do so. Abell indicated that Mooney approached him with his concerns on October 20.

Dean Wood testified that on an unknown date Jeff Abell told him of Mooney's concerns about not being able to vote in the election because it had been scheduled on a day he did not work for the Employer. Abell told Wood that he was going to speak with human resources department manager Jeff Tolsma.

Abell testified that he spoke with human resources department manager Jeff Tolsma about Mooney's situation and asked if anything could be done. Tolsma told

[5] Mooney also has a full-time job with an employer located in LeMars, Iowa, where he lives. On the day of the election he was scheduled to work his other job, which is located approximately 35 miles one way from the Employer's facility.

Abell that he would look into it. About two days later, Tolsma told Abell that the election time had been changed so it would occur earlier in the day. Tolsma also told Abell that the Employer could possibly pay Mooney mileage for the driving distance between the Employer's facility and LeMars, Iowa. Abell in turn told Mooney about the election time being changed and further added that the Employer possibly could pay Mooney for his mileage between the Employer's facility and LeMars, Iowa and that issue was still being researched. Wood, who had heard from Tolsma that the Employer might be able to reimburse Mooney for mileage, also conveyed this information to Mooney.

Mooney testified that on the Tuesday before the election Wood told him that: (1) the time of the election had been changed, enabling him to come in to vote and get back to LeMars in time for the start of his other job; and (2) the Employer would be able to pay him for his mileage as the Employer's attorneys had said it was allowed. Mooney looked up the number of miles to and from LeMars on MapQuest – 70 miles -- and believes he was paid $.55 or maybe $.58 per mile. When I asked Mooney if Wood told him what the actual mileage rate was based on Mooney said "I think it was like the standard rate. I don't know the exact name of it . . . ." Mooney also testified that Abell never told him how he should vote.

Both Abell and Wood denied telling Mooney that a payment for mileage was contingent on Mooney voting a certain way. Neither Abell nor Wood was aware of any other employees who requested payment for mileage to come to the Employer's facility to vote. Wood testified that the Employer did not make other employees aware that it was going to reimburse Mooney for mileage. Employee Norma Fuentes, who lives about 15 minutes driving distance away from work, testified that she was not scheduled

to work on the day of the election but she did come in to vote. Fuentes never asked the Employer for reimbursement to come in and vote. Wood testified that Fuentes had taken a day of vacation on election day, and she did not ask for any type of compensation from him in order to come in and vote. Abell did testify that he was aware that Fuentes was not scheduled to work on the day of the election but she did not ask him for mileage reimbursement. Abell estimated that Fuentes lived about 10 miles from work.

Analysis

With regard to an employer making a payment to an off-duty employee to encourage voting, in Good Shepard Home, 321 NLRB 426 (1996), the Board found that a good faith effort to reimburse an off-duty employee's actual transportation expenses for attending the election was not objectionable. In Sunrise Rehabilitation Hospital, 320 NLRB 212 (1995), the Board found that a party engages in objectionable conduct by paying employees to attend the election unless the payment is for the reimbursement of actual transportation expenses.

Mooney initially asked to get paid for coming to the facility on a day when he was not working. The Employer, after checking with legal counsel, determined it would reimburse Mooney for his round trip mileage from LeMars to the Employer's facility. While Mooney did not testify that the Employer paid him the standard IRS rate for mileage when using a car for business, he did say that he thought it was the "standard" rate and it was either $.55 or $.58 per mile. Mooney used MapQuest to determine the actual number of miles he traveled – 70 miles round trip. A Google search for "standard IRS mileage rate" revealed links to the IRS website. The IRS website reads that the

standard mileage rate for 2009 is $.55 per mile. The standard rate for 2008 was $.58 per mile. The use of the IRS standard mileage rate is a commonly-recognized way of reimbursing employees for business use of their private vehicles.

Although it is not necessary to have a connection in order to find conduct objectionable, there was no record evidence that the Employer's payment to Mooney was tied to how he should vote in the election.[6] The record is clear that the Employer did not reimburse any other employees for their mileage expenses to come to the facility and vote – including off-duty employee Norma Fuentes, who testified she lived about a fifteen-minute drive from work.[7] However, neither Fuentes nor any other employee made a request for some type of reimbursement as Mooney did. If the Employer was really buying votes as the Union contends in its brief, logic follows that the Employer would have told other employees they could be reimbursed for their mileage expenses in order to drive to work and vote. Therefore, I conclude that the Employer's payment to Mooney was not substantial and instead was based on reimbursement for his actual transportation costs, which is not objectionable under cases cited earlier herein. As the Union has not met its burden, I recommend that the Board overrule Union Objection 1 in its entirety.

Objection No. 2. On or about October 27, 2009, the Company held a captive audience meeting. During the meeting, a Company supervisor, Mr. Dean Wood, told employees that it would be easy to figure out the voting preferences of the employees as a result of the small number of employees in the bargaining unit. It is the Union's position that Mr.

[6] DLC Corp., d/b/a Tea Party Concerts and/or Live Nation, 353 NLRB No. 130 (March 31, 2009.

[7] In its brief the Union writes that both Fuentes and Mooney live fifteen minutes away from work but this is not correct. The record is clear that Mooney lives 35 miles from work and he could not drive that distance and arrive to work in fifteen minutes without substantially exceeding the speed limit.

Wood's statement was coercive in light of the Company's treatment of Ms. Heidi Young in case Nos. 18-RC-17500 and 18-CA-18406. [8]

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Lab technicians Mike Kelly and Lisa Theisen testified in support of this objection. Kelly, who served on the Union's negotiating committee and acted as the Union's observer during the election, and Theisen both attended the meeting in question. Both Kelly and Theisen testified they believed all unit employees except Maureen Haire were at the meeting. On cross-examination, Petitioner Qudsia Hussaini asked Kelly whether employee Kathy White was at this meeting and Kelly testified that White probably was not there – if that was Hussaini's recollection. Hussaini also asked Theisen this question and Theisen testified that she believed White was present, but could not say for sure. Theisen testified that Wood had notes in front of him during this meeting and Kelly testified that he believed Wood had notes.

Kelly's Testimony About Wood's Comments At the October 27 Meeting

When asked what Wood said at the meeting, Kelly testified: ". . . Mr. Wood came in stating that he wasn't trying to persuade – or what was I – he came in basically saying that he wasn't trying to influence people . . ." but that he did comment on the

[8] At the hearing I took official notice of the Board's Decision, Order and Direction in Cases 18-CA-18406 and 18-RC-17500, reported at 352 NLRB 406 (2008). In that Decision, the Board concurred with the finding of the administrative law judge that the Employer violated Section 8(a)(1) of the Act by: promising benefits to unit employees, interrogating two employees about their Union sympathies and telling employees that, in the event of an economic strike, they would have no job protection if replaced. The Board also concurred with the administrative law judge's finding that the Employer violated Section 8(a)(3) of the Act by accelerating the termination of Heidi Young and that Young was an eligible voter whose ballot should be opened and counted. As the unfair labor practice violations found were coextensive with the Union's objections to the election, the objections were sustained and the election was set aside. Further, it was directed that the ballot of Young be opened and counted and if the revised tally of ballots showed that the Union received a majority of the valid votes cast, a Certification of Representative should issue. Alternatively, if the tally showed the Union did not receive a majority of the valid votes case, the election should be set aside and a new election held. I also take official notice that in Case 18-RC-17500, the revised tally of ballots showed that 7 votes were cast in favor of the Union and 6 votes were cast against the Union and a Certification of Representative issued on May 20, 2008.

divide among the employees in the lab. Kelly said that Wood also asked the employees what they were voting for, and did they not want to represent themselves. Kelly also testified on direct examination that: "He was also going on about how – I'm trying to remember exactly what was going on." Kelly further testified that Wood said that with 200 employees in production it would be difficult to find out which way people were voting, but that ". . . with 12, 13 people, it'd be pretty easy to count who's voting which way (emphasis added).

Kelly continued his testimony on direct examination and indicated that after telling employees that determining voter preference would be easy, Wood told the employees that any kind of harassment of employees would not be tolerated and that in another twelve months the employees could seek another decertification election or "re-up."[9] Union counsel asked Kelly his recollection of comments that Wood made at a

[9] In its post-hearing brief the Union, for the first time, contends that a statement allegedly made by manager Dean Wood -- to the effect that in twelve months the employees could try another decert or re-up -- is also objectionable. The Union contends the alleged statement was made during the October 27 employee meeting. The Union further contends in its post-hearing brief that this statement was an implicit promise of benefits that without Union representation the working conditions in the lab would improve.

In its brief the Union cites Seneca Food Corp., 244 NLRB 558 (1979), for the proposition that a Regional Director can set aside an election based on conduct discovered during an investigation, even though that particular conduct was not the subject of a specific objection. It is correct that a Regional Director can do so, but in Precision Products Group, 319 NLRB 640 (1995), the Board distinguished the authority of a hearing officer from a Regional Director. As hearing officer, I am bound to consider only the issues in the Regional Director's Order Directing hearing. See Iowa Lamb Corporation, 275 NLRB 185 (1985).

In Rhone Poulenc, Inc., 271 NLRB 1008 (1984), the Board stated that an objecting party may not expand the scope of its objections after the timely filing period unless it can show by "clear and convincing proof that the evidence is not only newly discovered but was also previously unavailable." The Union has presented no proof and has made no claim that the evidence in support of its unalleged objection was newly discovered and previously unavailable. I say this because the Union's two witnesses both provided testimony about Objection No. 2 which is another statement timely alleged to be objectionable and made by Wood at the October 27 meeting. During the Union's investigation of possible objectionable conduct when speaking with its witnesses it could have questioned them about all statements Wood made at this meeting. As in Iowa Lamb, the Union did not allege the 12-month statement by Wood as an objection; it was wholly unrelated to the two timely filed objections which were set for hearing; the Regional Director did not identify the issue as one to be addressed at the hearing, and I did not inform the parties at the hearing that I intended to consider the issue in my report. Therefore, I am not considering the 12-month statement to have been a timely-filed objection.

meeting held on May 30, 2007, prior to the election in which the Union was certified as the collective bargaining representative of the unit employees. I asked counsel how something that happened in 2007 would be relevant to the instant case, as it could not be objectionable now. Counsel answered that it was relevant because in prior Case 18-RC-17500 Wood ". . . had a habit of asking for additional time without union representation to give the Company to prove to employees that they didn't need a union which was found to be objectionable in the previous case." I told counsel that I had earlier taken official notice of the Board's Decision involving the prior petition and an unfair labor practice case, so it was not necessary to obtain testimony on what occurred in 2007.[10]

During cross-examination, counsel for the Employer elicited testimony from Kelly indicating that he had discussed his opinion of Union organizing with his co-workers and they knew his position on the subject and further that his vote was not influenced by Wood's speech during the October 27 meeting. Kelly further testified on cross-examination that at the October 27 meeting Wood said that the vote was by secret ballot, and that employees did not need to disclose how they voted. Kelly also admitted that he read the questions and answers on Union Exhibit 1,[11] including a question asking whether the Union will know how employees vote and the answer:

[10] With regard to the prior cases, what was found to be objectionable and an unfair labor practice were statements made by Wood at a employee meeting where he told them that the department was understaffed and his first goal would be to fully staff the department. Additionally, Wood said that he had recently been given the position as the lab's new supervisor and he felt he could do an adequate job of carrying out other changes. The administrative law judge found Wood's statements to be promises to resolve employee problems if they abandoned their pursuit of union representation.

[11] A three-page document distributed by the Employer on October 16 titled "Frequently Asked Questions and Answers."

No. Your vote is by secret ballot and the election is supervised by a government agent. Your vote is completely confidential and neither the Company nor the Union will know how you voted unless you tell them.

On cross-examination, Kelly initially testified that Wood said ". . . we'll probably know which way people are voting" (emphasis added). When asked to repeat Wood's comments, Kelly testified that Wood said: ". . . it's gonna be pretty easy to figure out which way people are voting." Employer counsel asked Kelly if he recalled Wood saying that it would be easy for the Company to figure out voting preferences and Kelly said he did not recall. Kelly had the same response when asked if Wood said that employees would be able to figure out how other employees voted. Kelly also did not recall if Wood said that if enough employees failed to tell others how they voted then there would be doubt as to how employees voted. Finally, at the end of cross-examination, Employer counsel read the objection aloud and again asked Kelly if he recalled Wood saying that it would be easy for the Company to figure out voting preferences. Kelly responded that Wood said it would be easy to figure out.

Theisen's Testimony About Wood's Comments At October 27 Meeting

According to Theisen, Wood told employees that he thought having the Union represent the lab was a mistake. Theisen testified that Wood further said that ". . . it would be really easy to figure out who voted for what, whether the Union or the Company" (emphasis added) because the voting group was small. During cross-examination Theisen was asked by counsel what she recalled Wood saying and she testified ". . . it was a small lab, small group of employees voting, and it was gonna be really easy to figure out who voted for what." Counsel asked Theisen if Wood said it would be easy for the Company to figure out how employees voted and Theisen said

that Wood said it would be easy for him to figure out. Theisen did not recall if Wood said that if enough employees failed to tell others how they voted that there would be doubt about how employees voted.

During cross-examination Theisen admitted that she recalled Wood telling employees that: the vote was by secret ballot; they did not have to disclose how they voted; and intimidation and harassment of employees would not be tolerated.

Employer Witness Testimony About Woods' Comments at October 27 Meeting

The Employer called head of total quality management Dean Wood, quality control lab manager Jeff Abell and unit employees Travis Mooney, Dustin Livermore and Norma Fuentes to provide testimony about this objection.

Wood testified that he spoke to employees on October 27 at about 3:30 p.m. in the conference room.[12] When Wood gave his presentation to employees he spoke from notes he had prepared earlier in the day. A copy of Wood's notes was admitted into the record as Employer Exhibit 1. Wood remembered telling employees that intimidation and harassment were against the law and Employer policy and would not be tolerated. He spoke about these issues because two lab technicians approached unidentified managers and expressed concern about possible retaliation by the Union because of how the two lab techs were going to vote. Wood also encouraged all employees to vote and told them that voting was by secret ballot.

Counsel for the Employer asked Wood if he recalled saying words to the effect that due to the small number of employees "you" – meaning Wood, would be able to

[12] According to Wood, present were employees Trish Peterson, Qudsia Hussaini, Lisa Theisen, Wes Merrill, Mike Kelly, Corissa Church, Janet King, Karen Bruene, Dustin Livermore, Norma Fuentes and Travis Mooney. On cross-examination Wood testified that employees Maureen Haire and Katherine White were not present.

determine how employees voted. Wood responded that he said "Due to the small number of voters, if people are talking, you" – as in the group that I was addressing – "may be able to determine how people voted." Then, in response to a series of leading questions on direct examination by Employer counsel, Wood agreed that he: never said that he personally would be able to determine how employees voted; said employees don't have to disclose their votes; said it is no one's business how an employee votes; said if enough people are not talking about how they voted there will be doubt; said the vote is by secret ballot; and said that intimidation and harassment are illegal.

When questioned by Union counsel on cross-examination, Wood agreed that during the October 27 meeting he did not speak verbatim from his notes. In particular Wood said he did not speak verbatim from the section of his notes about the statement in question, but rather he added more words to make it flow like a speech. The portion of the notes in question read:

> --with only 13 votes, if people are talking, you might be able to figure out how people voted
> --you do not have to disclose how you vote – no one else's business
> --if enough are not disclosing, there will be doubt
> --Intimidation and harassment are illegal and will not be tolerated gloating
> --now and going forward, will not be tolerated
> --regardless of outcome – no gloating, harassment or intimidation
> --inside or outside lab

Wood initially denied that he made a statement to the effect that it would be difficult to figure out how people voted with a 200-person bargaining unit, but when pressed by counsel on cross-examination, he said it was possible he said something like that.

Abell was present at a meeting where Wood spoke to the unit employees, but Abell could not recall the date. When asked whether he was present at the meeting on

October 27 where Wood spoke, Abell said no. Abell did testify that employee Trish Peterson told him that she was concerned about retaliation from the Union based on how she was going to vote, and Abell told her that the Employer would not tolerate intimidation or retaliation.

Lab technician Mooney testified that he attended the meeting on October 27 where Dean Wood spoke. In response to leading questions on direct examination, Mooney agreed that Wood told the employees that the election was by secret ballot and that no one had to disclose how they voted. Counsel next asked Mooney: "Do you recall Mr. Wood saying that with only 13 voters, if employees are talking about how they voted, people might be able to figure out ---." Mooney answered "Yeah."[13] Counsel then asked Mooney if he believed that Wood's comments on October 27 were intimidating or coercing – to which he responded "No."

Counsel for the Union began cross-examination of Mooney and asked him what he recalled Wood saying at the meeting on October 27. Mooney testified "I don't know if I could tell you exactly what he said." When asked for his recall Mooney did say that Wood told employees that it was a small lab and if employees were to tell other employees how they voted it would not be difficult to figure out how the employees voted.

Lab technician Dustin Livermore testified that he did not remember if Wood had notes when he spoke at the October 27 meeting and that Wood said the vote was by secret ballot. Counsel then asked Livermore if Wood said anything about whether or

[13] Counsel for the Employer was cautioned against asking leading questions on direct examination.

not employees had to disclose their vote and Livermore said he remembered that Wood said employees did not have to disclose how they voted. The next question for Livermore was whether or not he remembered anything about intimidation and harassment -- to which he responded that Wood said action would be taken against any one who harassed another employee. Counsel asked Livermore if he remembered anything else about what Wood said and he said he did not. Counsel then asked additional leading questions of Livermore and he admitted that he did not believe Wood's statements were intimidating and while Livermore did not vote in the election, Woods' statements at the meeting were not why he failed to vote.

Norma Fuentes testified that she recalled Wood saying that: both sides needed to respect each other and after the election Wood did not want any employees to be harassed; the vote was by secret ballot; and she did not believe Wood's comments to be threatening or intimidating.

Analysis

In Corner Furniture Discount, 339 NLRB 1122 (2003), the Board rejected the employer's contention that a pro-union employee threatened three employees that the union would know how they voted, and if they voted against the union they would suffer reprisals. While the pro-union employee was found not to be an agent of the union and when viewed as third party conduct, the statements were not objectionable, the Board agreed with the administrative law judge that the employees could not have taken the pro-union employee seriously because the employees received numerous assurances that the voting was confidential. In Corner, the employer told employees the vote was by secret ballot and distributed a letter which indicated the same. Additionally, the

Board reasoned that the employer was required to post the Board's notice of election which contains a sample ballot with the words "Official Secret Ballot" across it.

Pursuant to Picoma Industries , 296 NLRB 498 (1989), the subjective reaction of an employee is irrelevant to the question of whether there was objectionable conduct, and instead the test is based on an objective standard. Therefore, employee testimony about whether they believed statements by Wood were intimidating and/or coercing is not dispositive of whether the statements were objectionable.

The testimony of the Employer witnesses Wood and Mooney and Union witnesses Kelly and Theisen differs in one aspect. Both Wood and Mooney indicate that Wood qualified his statement about it being easy to determine voting preferences if employees told one another how they voted. Kelly and Theisen do not recall Wood using that qualifier. The testimony of Union witnesses Wood and Theisen differs in one aspect. Theisen testified that Wood said it would be easy for him to figure how employees voted and Kelly testified that Wood did not qualify the statement by indicating it would be easy for Wood personally to figure out the voting preferences of employees. Regardless of whether or not Wood did use those two qualifiers, I find that it does not make a difference. Assuming that Wood said what the Union's witnesses claim that he said at the October 27 meeting, I find that his statement was not objectionable. I make this finding based on Corner Furniture Discount Center, Inc. supra. As in Corner, in the instant case the employees heard enough assurances that their votes were confidential. First, during the same October 27 meeting where he is alleged to have told employees it would be easy to figure out how they voted, both Union witnesses agree that Wood told employees they did not have to disclose how

they voted and the voting was by secret ballot. Second, Wood's notes for the October 27 meeting (Employer Exhibit 1) contain references to the election being by secret ballot and employees not having to disclose how they voted. Third, the Employer distributed a written assurance that the voting was by secret ballot, Union Exhibit 1. That exhibit is a three-page question and answer document dated October 16, 2009 and it reads that the vote is by secret ballot, is confidential and that the parties won't know how employees voted unless the employee tells the Company or the Union. Union witness Kelly testified that he read Union Exhibit 1. Finally, the Employer was required to post the Notice of Election sent to it by the Region, and the Notice contains a sample ballot with the words "Official Secret Ballot" in bold letters and in the largest font on the ballot itself.

The Union cites no case standing for the proposition that the statement made by Wood is objectionable, and I find that it has not met its burden of establishing that Wood made an objectionable statement. Therefore, I recommend that the Board overrule Objection No. 2 in its entirety.

CONCLUSION AND RECOMMENDATION

In view of the foregoing findings of fact, and after carefully considering all of the evidence in the record, I recommend that Objection Nos. 1 and 2 be overruled in their entirety and that an appropriate Certification be issued.[14]

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[14] *Right to File Exceptions:* Pursuant to the provisions of Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may file exceptions to this Report with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001.

Procedures for Filing Exceptions: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, exceptions must be received by the Executive Secretary of the Board in Washington, D.C. by close of business on January 19, 2010, at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file exceptions electronically.** If exceptions are filed electronically, the exceptions

Dated at Minneapolis, Minnesota, this 5th day of January 2010.

Susan M. Shaughnessy, Hearing Officer
National Labor Relations Board
Eighteenth Region
330 Second Avenue South, Suite 790
Minneapolis, MN 55401-2221

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will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of exceptions filed by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file. A copy of the exceptions must be served on each of the other parties to the proceeding, as well as to the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing exceptions electronically may be accomplished by using the E-filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select the E-Gov tab, and then click on the E-filing link on the pull down menu. Click on the "File Documents" button under Board/Office of the Executive Secretary and then follow the directions. The responsibility for the receipt of the exceptions rests exclusively with the sender. A failure to timely file the exceptions will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other reason, absent a determination of technical failure of the site, with notice of such posted on the website.